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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM,

ROBERT HENDERSON,

Petitioner,

-v-

NORMAN SILVERSTEIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent Norman Silverstein submits this brief in opposition to petitioner's application for a writ of certiorari.

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STATEMENT OF THE CASE

A. The Trial Court Proceedings

Respondent Silverstein is retarded and illiterate. He has an I.Q. of 74 and the mental age of a seven-year-old. He has not developed intellectually beyond the second grade level. He has a long institutional history, having been committed to Rockland State Hospital three times and held for observation at least once at Bellevue and Mid-Hudson State Hospitals. He has been diagnosed as possibly schizophrenic.*

On April 20, 1976, respondent was indicted for robbery and possession of a weapon (Indictment #994/76).** On March 22, 1977, the judge of the Bronx Supreme Court before whom respondent was appearing on the first indictment ordered that he be examined pursuant to Article 730 of the Criminal Procedure Law of the State of New York to determine whether he was competent to stand trial. After that examination had taken place, both of the psychiatrists appointed by the court reported that respondent was incompetent to stand trial. Based on these findings, the court on April 12, 1977 ordered that respondent be committed to an appropriate mental institution, saying:

> THE COURT: For the record, this report has been received by the Court pursuant to 730 of the C.P.L., Article 730 and the finding by two psychiatrists is that the defendant, that his judgment and intelligence are sufficiently impaired to the extent that he cannot assist in his own defense and he is unfit to proceed. Under those circumstances, the motion to confirm the report is granted and the

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* Silverstein v. Henderson, Slip Op. at 3103. (Petitioner included the Second Circuit's decision in this case as Appendix A to his petition for a writ of certiorari. Because of the large number of omissions and typographical errors in that appendix, however, a copy of the court's slip opinion is attached as Appendix A to this response. References are to the pages of the slip opinion.

** Later, respondent was also indicted for forgery and related crimes (Indictment #475/77).

> defendant, Norman Silverstein, having been examined pursuant to Court Order by two psychiatric examiners, the Court having examined such examination report, a copy of which will be attached to this order, it now appears to my satisfaction that the defendant as a result of the mental disease or defect lacks capacity to understand the proceedings against him or to assist in his defense.
>
> I therefore order that the defendant is to be continued in detention and referred to--he will be in Bellevue Hospital until such time as the Department of Mental Hygiene sends him to the appropriate institution. All right, so ordered.
>
> Transcript of April 12, 1977 at 3-4.*

One week later, however, Mid-Hudson Psychiatric Center informed the prosecutor that a psychiatrist there had conducted another examination of respondent (which allegedly lasted only fifteen minutes) and had concluded on the basis of that interview that respondent was competent to stand trial. Despite the conflict between the findings of this psychiatrist and the findings of the two psychiatrists who had examined respondent just a few days earlier, neither the court nor respondent's counsel suggested that a hearing be held, as required by N.Y. Crim. Proc. Law §730.30(4), to determine which conclusion was correct. Rather, they simply proceeded immediately to plead respondent guilty to robbery in the first degree (29a).**

The colloquy between respondent and the court during the taking if that plea established that respondent in fact was not guilty of that crime. New York State Penal Law §160.15 states that it is an affirmative defense to robbery in the first

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* Although petitioner included the transcripts of all of the other state court proceedings in his appendix, he omitted this transcript. It is therefore set forth as Appendix B to this response.

** References followed by "a" are to the pages of petitioner's appendix.

degree that the weapon the perpetrator was carrying was not loaded. It was brought out during the plea colloquy, however, that respondent was armed only with a toy gun (32a). At no time did the court or defense counsel attempt to explain to respondent that the fact that the gun was a toy constituted a complete defense to this particular charge. Rather, the court simply accepted the guilty plea, ordered a pre-sentence report, and scheduled sentencing for June 21, 1977.

The pre-sentence report once again called the court's attention to respondent's extensive history of psychiatric problems. Thus, the report stated that respondent is very limited intellectually, with an I.Q. of about 74, that he is considered retarded, that he has been diagnosed as having a severe personality disturbance with possible underlying schizophrenia, that he had a history of repeated hospitalizations at Rockland State, Bellevue and Mid-Hudson, and that he is illiterate and at about the second grade level intellectually.

At the sentencing proceeding on June 21, 1977, the court again indicated its awareness of respondent's serious psychiatric problems, stating:

> [The Defendant] was declared incompetent to stand trial and committed to the Mid-Hudson Institute. However, on April 19th, 1977, the District Attorney was notified by the doctor that this defendant was fit to stand trial. Then on April 20th, he pled guilty before me . . .
>
> . . . Now, this defendant has had without any question a psychiatric history. He has committed acts as early as the age twelve. He was at one time committed to Rockland State Hospital as a child. He was additionally held for observations in Bellevue before coming into contact with the law as a juvenile.
>
> It's my feeling that this defendant has a mental problem but the community must be protected against a defendant who has demonstrated, as far as the facts are concerned, a dangerous person and I am, in sentencing this defendant,

> making a specific recommendation effort should be made to see to it that this defendant receives psychiatric care. In my opinion it is essential because after this defendant is discharged and someday he will be discharged, we must make every effort to see that he is not discharged in the same mental manner in which he goes in.
>
> (42a-43a)

The court then sentenced respondent to an indeterminate term with a maximum of eighteen years and a minimum of nine years.

B. The Direct Appeal

The psychiatric report finding respondent incompetent to stand trial was never made a part of the record in respondent's direct appeal. Consequently, respondent's assigned appellate counsel, who had not represented him at trial, was never made aware of the conflicting psychiatric opinions concerning respondent's competence. In respondent's direct appeal, therefore, his counsel argued only that respondent's sentence was excessive. The Appellate Division, First Department, affirmed without opinion, People v. Silverstein, 65 A.D.2d 679 (1st Dept. 1978). Leave to appeal to the New York Court of Appeals was denied on November 28, 1978.

C. The First Coram Nobis Petition

A fellow inmate thereafter filed a pro se motion for respondent pursuant to New York Penal Law §440.10 on September 11, 1980, arguing inter alia that his federal constitutional rights had been violated by the ineffective assistance of his trial counsel, particularly because of counsel's failure to request a competency hearing, the improper allocution of the guilty plea, and respondent's unknowing waiver, by pleading guilty, of his constitutional rights. The trial court denied this motion with the following endorsement:

> Upon the foregoing papers this pro se motion is denied. The issues presented by the defendant have already been determined by the Appellate Division (see People v. Silverstein, 65 A.D.2d 679).

Respondent's application for leave to appeal this decision to the Appellate Division, First Department, was denied on December 11, 1980 by Justice Sullivan of that court.

D. The Second Coram Nobis Petition

In January, 1981, the fellow inmate filed a second coram nobis proceeding alleging that respondent's federal constitutional rights had been violated in that, at the time of the lower court proceedings, he was suffering from a mental disease of such degree as to render him incapable of understanding those proceedings, and that he had been denied effective assistance of counsel both in the trial court and on appeal. The trial court likewise denied this motion on the ground that the issues had already been decided by the Appellate Division during the direct appeal (37a-38a). Application for leave to appeal to the Appellate Division was denied on March 12, 1981 (Carro, J.).

E. The Federal Habeas Corpus Proceedings

On January 8, 1981, respondent's inmate friend filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York, arguing inter alia that respondent's federal constitutional rights had been violated: 1) by the fact that he was incompetent when he pleaded guilty and was not afforded a competency hearing; 2) by the improper allocution of his plea; 3) by the ineffective assistance of his trial and appellate counsel; and 4) by his unknowing waiver of his constitutional rights in pleading guilty.

The district court held that all of these issues had been exhausted in the state courts (20a).*

The court then examined the state court's stated reason for denying respondent's coram nobis petitions on these issues — that the issues had already been decided adversely to respondent on his direct appeal — and concluded that this finding was erroneous (21a fn). The district court then held that the state court had really denied the incompetency issues raised in respondent's coram nobis applications for the opposite reasons — because he had failed to raise the issues contained therein on his direct appeal. This, the district court held, constituted a state procedural default barring respondent from raising these issues in a habeas proceeding in the federal courts (22a-24a).

The United States Court of Appeals for the Second Circuit reversed the district court, finding that the state courts had not, would not and constitutionally could not have found that respondent had committed a procedural default (Appendix B, Slip Op. at 3108-3116). The Court then went on to address the merits of respondent's claim, holding that in the face of the extensive evidence before the trial court indicating that respondent was incompetent to plead or stand trial, that court had violated respondent's constitutional rights by accepting his guilty plea without first conducting a hearing to determine whether he was competent (id., Slip Op. at 3116-3118). Consequently, the Court ordered that the writ of habeas corpus issue unless respondent was brought to trial within a reasonable time.

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* Respondent also argued that misrepresentations in his pre-sentence report had violated his constitutional rights. Respondent conceded, however, that he had not raised this issue as a federal constitutional claim in the state courts, and therefore subsequently agreed to delete any reference to this claim from his petition (9a).

REASONS FOR DENYING THE WRIT

A. THE SECOND CIRCUIT'S DECISION ON THE MERITS OF RESPONDENT'S CLAIM — THAT SINCE THE TRIAL COURT WAS PRESENTED WITH CONSIDERABLE EVIDENCE CREATING A SUBSTANTIAL DOUBT AS TO THE RESPONDENT'S COMPETENCE TO STAND TRIAL, IT WAS CONSTITUTIONALLY OBLIGED TO HOLD A HEARING TO DETERMINE WHETHER HE WAS COMPETENT — IS CONSISTENT WITH, AND COMPELLED BY, THE PRIOR DECISIONS OF THIS COURT.

Two of the three psychiatrists who examined respondent reported to the court that he was incompetent to understand the proceedings or stand trial. Nevertheless, the trial court, without conducting any hearing to determine whether respondent was competent, simply certified him so and proceeded to accept his plea of guilty to robbery in the first degree. The colloquy on that plea established that respondent in fact was not guilty of that crime and that he was pleading guilty without a clear understanding of the relationship between the facts and the law, or the constitutional rights he was waiving.

One of the most fundamental tenets of due process in our adversary system of justice is that a defendant whose "mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense" may not be subjected to a criminal trial. Drope v. Missouri, 420 U.S. 162, 171-72 (1975). Such a prohibition is particularly appropriate in the case of a guilty plea, where the defendant is expected intelligently to waive inter alia his consitutional rights to trial by jury and to compulsory process, as well as his privilege against self-incrimination and his right to be acquitted unless the prosecution can prove beyond a reasonable doubt that he is guilty of the crimes charged. A waiver of such fundamental rights is valid only if it constitutes "an intentional relinquishment

or abandonment of a known right or privilege". Johnson v. Zerbst, 304 U.S. 458, 464 (1938). As this Court said in McCarthy v. United States, 394 U.S. 459, 466 (1966), if a guilty plea is not "equally voluntary and knowing, it has been obtained in violation of due process and is therefore void".*

Since the Constitution required that respondent make a voluntary and knowing decision to waive these rights before he could properly plead guilty, it also required that he be competent to do so. Pate v. Robinson, 383 U.S. 375 (1966):

> Pate v. Robinson, supra, and McCarthy v. United States, supra, teach us that a guilty plea made while a defendant is incompetent violates due process and is therefore void. It logically follows that any Boykin [v. Alabama, 395 U.S. 283 (1969)] discussion occurring while a defendant is incompetent is also a nullity.
>
> United States ex rel. Suggs v. LaVallee, 570 F.2d 1092, 1116 (2d Cir.), cert. denied, 439 U.S. 915 (1978).

In the present case, ample evidence existed that respondent was not competent at the time he pleaded guilty. Two of the three psychiatrists who had examined him just prior to his plea proceeding concluded that he was not competent. In fact, on the basis of their reports, the trial judge initially ruled that respondent was incompetent and committed him to the custody of the Department of Mental Hygiene. He summarized the psychiatrists' findings thus:

> THE COURT: For the record, this report has been received by the Court pursuant to 730 of the C.P.L., Article 730 and the finding by two psychiatrists is that the defendant,

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* The requirement of knowing waiver in guilty pleas is so fundamental that some courts have held that even greater competence must be established to enable a defendant to plead guilty than would be required to enable him to go to trial. See, e.g., Sieling v. Eyman, 478 F.2d 211 (9th Cir. 1973). This conclusion was based on this Court's decision in Westbrook v. Arizona, 384 U.S. 150, 86 S.Ct. 1320, 16 L.Ed.2d 429 (1966) (per curiam), which recognized a distinction between competence to stand trial and competence to waive the right to counsel, the former not necessarily guaranteeing the latter.

> that his judgment and intelligence are sufficiently impaired to the extent that he cannot assist in his own defense and he is unfit to proceed. Under those circumstances, the motion to confirm the report is granted and the defendant, Norman Silverstein, having been examined pursuant to Court Order by two psychiatric examiners, the Court having examined such examination report, a copy of which will be attached to this order, it now appears to my satisfaction that the defendant as a result of the mental disease or defect lacks capacity to understand the proceedings against him to to assist in his defense.
>
> I therefore order that the defendant is to be continued in detention and referred to —he will be in Bellevue Hospital until such time as the Department of Mental Hygiene sends him to the appropriate institution. All right, so ordered.

One month later, however, citing the report of a third psychiatrist who found respondent competent, based on a single fifteen minute interview conducted just a few days after the other two psychiatrists had found him incompetent, the trial judge, without conducting any hearing to determine which conclusion was correct, simply reversed his finding, declared respondent competent, and proceeded immediately to accept his guilty plea.

The pre-sentence report likewise raised significant doubts as to respondent's competence, describing as it did his extensive history of psychiatric problems. Even at sentencing, the judge acknowledged that respondent had serious mental problems:

> . . . Now, this defendant has had without any question a psychiatric history. He has committed acts as early as the age twelve. He was at one time committed to Rockland State Hospital as a child. He was additionally held for observations in Bellevue before coming into contact with the law as a juvenile.
>
> It's my feeling that this defendant has a mental problem . . . I am, in sentencing this defendant, making a specific recommendation effort should be made to see to it that this defendant receives psychiatric care. In my opinion it is essential because after this defendant is discharged and someday he will be discharged, we must make every effort to see that he is not discharged in the same mental manner in which he goes in.

Given this extensive evidence that respondent was incopetent, the trial judge was mandated by constitutional due process requirements to hold a hearing. As this Court said in Pate v. Robinson, supra, 383 U.S. at 385-86:

> [If] circumstances generate a substantial doubt as to the accused's competence . . . a suitable hearing must be held.

See also Pate v. Smith, 637 F.2d 1068, 1071 (6th Cir. 1981); Hampton v. Tinsley, 240 F.Supp. 213 (D.Colo. 1965).

Such a hearing is also required by New York State Law. Section 730.30(3) of the New York Criminal Procedure Law clearly states:

> When the examination reports submitted to the court show that the psychiatric examiners are not unanimous in their opinion as to whether the defendant is or is not an incapacitated person, or when the examination reports submitted to the superior court show that the psychiatric examiners are not unanimous in their opinion as to whether the defendant is or is not a dangerous incapacitated person, the court must conduct a hearing to determine the issue of capacity or dangerousness.

The Constitution mandates such a hearing whenever "circumstances generate a substantial doubt as to the accused's competence". Pate v. Robinson, supra, 383 U.S. at 385-86. Such circumstances indisputably existed in the present case. Respondent's long history of psychiatric illness, his numerous commitments to mental institutions, the comments in the pre-sentence report, and the reports of two of the three psychiatrists who examined him all raised much more than a "substantial doubt" as to his competence. Given these circumstances, the trial court's failure to conduct a hearing to determine whether respondent was competent constituted a serious violation of respondent's constitutional rights. The Second Circuit was therefore correct in ordering that a writ of habeas corpus be issued unless petitioner corrected this constitutional violation by bringing respondent to trial within a reasonable period.

B. THE SECOND CIRCUIT'S PROCEDURAL FINDING — THAT RESPONDENT WAS NOT PROCEDURALLY BARRED FROM RAISING THE ISSUE OF HIS CONSTITUTIONAL RIGHT TO A COMPETENCY HEARING IN THE FEDERAL COURTS — IS ALSO COMPELLED BY THIS COURT'S PRIOR DECISIONS.

Despite this clear violation of respondent's most fundamental constitutional rights, petitioner nevertheless insists that respondent should be barred from federal habeas corpus relief because he failed to raise his claim in the state court in a particular procedural fashion.

Respondent filed two coram nobis petitions, each raising inter alia the argument that his constitutional rights had been violated by the trial court's failure to hold a competency hearing. He thus gave the state courts a first fair opportunity to pass on his constitutional claim. Picard v. Connor, 404 U.S. 270 (1971).

Petitioner claims, however, that because this potentially incompetent individual failed to raise his claim earlier — at trial or on direct appeal — he is forever barred by state procedural default from obtaining a determination of whether he was competent at the time he pleaded guilty.

The simple answer to the petitioner's contention is that a defendant whose competency is in doubt cannot be found to have lost through procedural default the right to a hearing on that issue. As this Court said in Pate v. Robinson, supra, 383 U.S. at 384:

> The State insists that Robinson deliberately waived the defense of his competence to stand trial by failing to demand a sanity hearing as provided by Illinois law. But it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently "waive" his right to have the court determine his capacity to stand trial. See, Taylor v. United States, 282 F.2d 16, 23 (8th Cir. 1960).

See also Bishop v. United States, 223 F.2d 582 (D.C.Cir. 1955), rev'd. 350 U.S. 961 (1956) (this Court reversed and remanded for

a competency hearing a case in which the Court of Appeals held that the right to such a hearing had been waived); Smith v. United States, 267 F.2d 210 (9th Cir. 1959); Taylor v. United States, 282 F.2d 16 (8th Cir. 1960).

Nor does the fact that respondent was represented by counsel who failed to demand such a hearing alter the conclusion reached in Pate. Pate's lawyer likewise failed to make such a demand; nevertheless, this Court held that the defendant was entitled to federal habeas corpus relief. As the Second Circuit said in United States ex rel. Codarre v. Gilligan, 363 F.2d 961, 964-65 (2d Cir. 1966):

> On this appeal we are not concerned with the substantive situation at the time the crime was committed, but rather with appellant's capacity at the time of the trial and of the plea of guilty. The issue with which we are faced is whether [an allegedly incompetent defendant] made a reasoned choice, "voluntarily after proper advice and with full understanding of the consequences", when he entered his plea of guilty. Kercheval v. United States, 274 U.S. 220, 223, 47 S.Ct. 582, 583, 71 L.Ed. 1009 (1927); see Machibroda v. United States, 368 U.S. 487, 493, 82 S.Ct. 510, 7 L.Ed.2d 473 (1962); United States ex rel. McGrath v. LaVallee, 348 F.2d 373, 376 (2d Cir. 1965). Where a guilty plea is not based upon a reasoned choice, the resulting conviction is open to collateral attack. See Machibroda v. United States, supra; Waley v. Johnston, 316 U.S. 101, 62 S.Ct. 964, 86 L.Ed. 1302 (1942); United States ex rel. McGrath v. LaVallee, 319 F.2d 308, 311 (2d Cir. 1963).
>
> * * *
>
> Since the record does not establish that in pleading guilty this [allegedly incompetent defendant] was exercising a reasoned choice, we find a denial of due process in New York's failure to provide adequate protective procedure.
>
> The fact that [the defendant] had court-appointed counsel who recommended pleading guilty is not conclusive. [The defenant] himself must have made a reasoned choice. See Brookhart v. Janis, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (April 19, 1966); Kotz v. United States

353 F.2d 312, 314 (8th Cir. 1965); cf. Fay v. Noia, 372 U.S. 391, 439, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963); Whitus v. Balkcom, 333 F.2d 496, 502-503 (5th Cir.), cert. denied, 379 U.S. 931, 85 S.Ct. 327, 13 L.Ed.2d 343 (1964). In Brookhart v. Janis, supra, 384 U.S. at 6, 86 S.Ct. at 1248, the Supreme Court held that the "constitutional rights of a defendant cannot be waived by his counsel" where "petitioner [himself] did not intelligently and knowingly agree to be tried in a proceeding which was the equivalent of a guilty plea".

Consequently, respondent's right to a proper determination of his competency cannot be said to have been waived by procedural default.

Even the state courts did not find that respondent was barred by procedural default from raising this issue. Rather, the state court said that the issue had already been raised and decided on its merits by the state appellate courts. If that was true, then state remedies on this issue have been exhausted and respondent was entitled to raise the issue in the federal courts. See, e.g., Picard v. Connor, 404 U.S. 270, 276 (1971).

Even if the state court was wrong and the issue was not raised in respondent's direct appeal, however, the procedural default doctrine is still not controlling. Wainwright v. Sykes, 433 U.S. 72 (1977), the case in which this Court articulated that doctrine is, by its own language, applicable only in those instances where the state courts denied the petitioner's application on "independent and adequate" state procedural grounds. Id., 433 U.S. at 87. If the state court's ground for denying a petition was in fact erroneous, then it does not constitute an "adequate" ground, and the prohibition of Wainwright does not apply.

Moreover, Wainwright is applicable only if the state court itself based its conclusion on a specific finding of procedural default. There is no basis in this record for believing that the state court would have accepted the claim of procedural default which petitioner now advances. Indeed, the state court ignored that ground in favor of a diametrically opposite finding when it

was proffered by the petitioners in their papers in opposition to respondent's coram nobis petitions. The state court, confronted with such an argument, could well have concluded under constraint of Pate v. Robinson, supra, that a finding of waiver was inappropriate in such circumstances.

Even if Wainwright is applicable, however, petitioner is still wrong in claiming that state procedural default bars consideration of the merits of respondent's claim. According to Wainwright, even a defendant whose constitutional claims were denied in the state courts on the basis of state procedural default is entitled to have the merits of his constitutional claim determined by the federal courts if he can show "cause and prejudice" for that default. As this Court explained in Wainwright, that qualification is designed to prevent "miscarriage of justice" (id., 433 U.S. at 91).

The instant case presents at least four different "causes" for any procedural default which respondent may be said to have committed in pursuing his right to a competency hearing. Separately or jointly, these causes more than satisfy the first prong of the Wainwright test:

1) Respondent's Incompetence - As previously explained, the basis of respondent's claim is that he was incompetent to stand trial or plead guilty. It therefore necessarily follows that he was also incompetent to comply with the state procedural requirements on which he is now acc used of defaulting. His incompetence thus provides sufficient "cause" to excuse any such default. Pate v. Robinson, supra.

2) Ineffective Assistance of Counsel - Respondent argued in the state and federal courts that his trial and appellate counsel had been ineffective in failing to preserve this and other issues in his behalf. Respondent submits that the failures of his state counsel constituted a violation of his Sixth and Fourteenth

Amendment rights. Whether or not counsels' overall conduct rose to that level, however, their failure, despite extensive evidence of respondent's incompetence, to follow the procedures necessary to preserve his fundamental right to a competency hearing establishes that they were sufficiently ineffective to satisfy the "cause" requirement of Wainwright. Thus, numerous courts and commentators have cited ineffective assistance of counsel as one of the most common justifications for excusing a procedural default under Wainwright. See, e.g., United States v. Williams, 615 F.2d 585, 591 (3d Cir. 1977); LiPuma v. Commissioner, 560 F.2d 84 (2d Cir. 1977); Hill, The Forfeiture of Constitutional Rights in Criminal Cases, 78 Colum.L.Rev. 1050, 1076.

3) Respondent's constitutional claim impugns the integrity of the process for distinguishing guilt from innocence. The conclusion that respondent was guilty of the crime to which he was pleading, as well as the subsequent judgment of conviction and sentence, were based entirely on respondent's own statements at the plea proceeding. If in fact respondent was incompetent at the time he made those statements, they do not provide a reliable basis for the judgment in this case. The fact that respondent's constitutional claim thus impugns the integrity of the process by which he was convicted and incarcerated is yet another "cause" why any procedural default should be excused. See, e.g., Brown v. Mississippi, 297 U.S. 278, 286-87(1936) (Court rejected state's argument that appellant had waived his right to challenge the admissibility of a coerced confession by failing to raise such an objection at trial); United States v. Wade, 388 U.S. 218 (1967); Sheppard v. Maxwell, 384 U.S. 333 (1966); Berries v. Egeler, 583 F.2d 515, 522 (6th Cir. 1978); The Forfeiture of Constitutional Rights in Criminal Cases, supra, at 1076.

4) Respondent has made a "colorable showing of innocence" of the crime to which he pleaded guilty. As previously

explained, the "cause and prejudice" test of Wainwright was designed to prevent miscarriage of justice, in particular the conviction of persons who are not in fact guilty of the crime charged. In this case, the plea proceeding establishes that respondent had a complete affirmative defense to the charge of first degree robbery because he was armed only with a toy gun. Nevertheless, he pleaded guilty to that crime and is now incarcerated serving the sentence imposed on the basis of that plea. The fact that he is apparently not guilty of that crime is yet another "cause" for excusing any default. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 Chi.L.Rev. 142, 160 (1970); The Forfeiture of Constitutional Rights in Criminal Cases, supra, at 1076-77.

The last "cause" factor also provides the "prejudice" required by the second prong of the Wainwright test. Respondent is not guilty of the crime for which he is presently incarcerated. Indeed, he may not be guilty of any crime, either because his incompetence left him without the requisite intent, or because he did not commit the acts at all but rather, as a result of his incompetence, was induced to plead guilty by the coersive nature of proceedings which he could not fully grasp.*

Whatever the case, the record in this proceeding clearly establishes that at the time respondent pleaded guilty, the trial court was in possession of considerable authoritative evidence indicating that respondent was incompetent. In the face of that evidence, the trial court's failure to hold a hearing to determine whether respondent was in fact competent before accepting his plea constituted a serious violation of respondent's constitutional

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* It has been suggested that the retarded individual may confess guilt to gain approval from others. See Col. Human Rights L. Rev. 239, 254 (1972); Floyd, The Mentally Retarded Public Offender and the Law, p. 18 (1968); President's Committee on Mental Retardation, Report of the Task Force on Law, p. 33 (1963); Commonwealth v. Daniels, 321 N.E.2d 822, 827 (Mass. 1975).

rights. The procedural roadblock now being cited by the petitioner to forever bar respondent from receiving such a hearing must not be permitted to frustrate this individual's fundamental rights. The Second Circuit properly ordered that the writ of habeas corpus should issue, and the state should be ordered to release respondent unless it promptly affords him the competency hearing or trial to which he has long been constitutionally entitled.

C. THE SECOND CIRCUIT IS NOT IN CONFLICT WITH THE NINTH CIRCUIT AS TO THE TEST TO BE APPLIED TO DETERMINE WHEN DUE PROCESS REQUIRES THAT A COURT CONDUCT A HEARING TO DETERMINE WHETHER A DEFENDANT IS COMPETENT.

The principal reason which petitioner gives for requesting a writ of certiorari is his contention that the Second Circuit is supposedly in conflict with the Ninth Circuit on the question of what circumstances will oblige a court, sua sponte if necessary, to conduct a hearing into the question of whether a defendant is competent to stand trial or plead guilty. The decisions of both Circuits clearly establish, however, that there is no conflict. Rather, both Circuits agree that the test to be applied is the one set forth by this Court in Drope v. Missouri, supra, and Pate v. Robinson, supra — namely, that if circumstances generate a substantial doubt as to the accused's competence, a suitable hearing must be held. Thus, in DeKaplany v. Enomoto, 540 F.2d 975, 980-81 (9th Cir. 1976), one of the cases cited by petitioner, the Ninth Circuit stated that a hearing is required sua sponte whenever there exists "substantial evidence" that the defendant may be mentally incompetent and that "evidence is 'substantial' if it raises a reasonable doubt about the defendant's competency to stand trial". Likewise, in United States v. Clark, 617 F.2d 180, 185 (9th Cir. 1980), another of the cases cited by petitioner, the Ninth Circuit stated that "Drope held that a trial court has a continuing duty to insure that a defendant is not subjected to trial if his "mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense . . . ."

It is therefore clear that the conflict which petitioner alleges is in reality not a conflict at all but rather simply an example of the differing results which necessarily occur when this

agreed-upon test is applied to different factual circumstances. Indeed, the Ninth Circuit said as much in United States v. Clark, supra, 617 F.2d at 184, when it noted that the question of whether a "hearing is required depends upon the evidence in each case, under the principles in Part II, infra (referring to the test quoted above)".

In the present case, the record before the trial judge — including the fact that respondent was retarded, his long history of institutionalization, and the fact that two of the three psychiatrists who had examined him within a few days of one another shortly before the plea proceedings had concluded that he was incompetent — was more than sufficient to generate a reasonable doubt as to his competence. Given that evidence, the trial court's failure to conduct a hearing as to respondent's competency constituted a clear violation of his constitutional rights. In contrast, the cases cited by petitioner contained facts which were considerably less compelling. In fact, the Second Circuit discussed one of those cases in a footnote to its opinion in this case as an example of how different circumstances could lead to a different result:

> The Ninth Circuit reached a different conclusion in a case where the third psychiatric report finding the defendant competent to stand trial was based on interviews conducted five months after two psychiatrists had found the defendant incompetent. United States v. Caplan, 633 F.2d 534, 539-42 (9th Cir. 1980). The defendant's status had apparently improved under interim psychiatric treatment. Because there was no other specific evidence of the defendant's alleged incompetence, the court of appeals held that it had not been an abuse of discretion not to conduct a competency hearing upon receipt of the third report.
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> Silverstein v. Henderson, supra, Slip Op. at 3117, fn. 15.

Here, to the contrary, there was no "interim psychiatric treatment". Rather, the third psychiatrist evaluated respondent just a few days after the first two psychiatrists had found him incompetent.

The principal problem with petitioner's arguments is that they all assume that the petitioner was competent. Thus, at one point, petitioner argues that the Second Circuit's decision "effectively vitiates a defendant's right to constitutionally waive possible defenses if he or she is able to make a reasoned choice among the alternatives presented and able to understand the nature and consequences of the waiver" (Petition at 11) (emphasis added). At another point, petitioner insists that the Second Circuit's decision subjects a defendant "to an unwanted hearing which fetters [the defendant's] reasoned choice [of whether to plead guilty]" (Petition at 12) (emphasis added). The principal goal of the Second Circuit's decision in this case, however, and indeed the principal goal of this Court's decisions in Pate and Drope, is to insure before a defendant waives any of his rights (i.e., by pleading guilty), that he is competent to make a "reasoned choice" and to "understand the nature and consequences of the waiver". Both the Second and Ninth Circuits agree that where, as here, the circumstances create a substantial doubt as to the defendant's competence, such doubts must be resolved at an appropriate hearing. Since no such hearing was held in this case, respondent's guilty plea is invalid and was properly set aside by the Second Circuit.

CONCLUSION

FOR THE ABOVE-STATED REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 535—August Term, 1982

Argued: December 2, 1982 Decided: April 12, 1983

Docket No. 82-2028

NORMAN SILVERSTEIN,

Petitioner-Appellant,

—against—

ROBERT HENDERSON,

Respondent-Appellee.

Before:

LUMBARD, MANSFIELD and KEARSE,
Circuit Judges.

Norman Silverstein appeals from a January 6, 1982, decision of the District Court for the Southern District of New York (Stewart, *J.*) dismissing his petition for a writ of habeas corpus. After refusing to consider an unrelated, unexhausted claim, the district court held that federal

Appendix A

consideration of the claim that Silverstein had been incompetent to stand trial was barred by the state court's finding of procedural default for failure to raise the competence issue on direct review of his conviction.

Reversed and remanded with orders to issue the writ.

MICHAEL YOUNG, ESQ., New York, N.Y., for Petitioner-Appellant.

GEORGE C. PERRY, Assistant Attorney General, New York, N.Y. (Robert Abrams, Attorney General of the State of New York, Gerald J. Ryan, Assistant Attorney General, New York, N.Y., of counsel) for Respondent-Appellee.

LUMBARD, *Circuit Judge*:

Norman Silverstein appeals from a January 6, 1982, order of Judge Stewart in the Southern District of New York dismissing his petition for a writ of habeas corpus. Silverstein is imprisoned in the New York State correction facility at Auburn, serving a nine-to-eighteen year sentence for armed robbery. The heart of his claim is that he was incompetent to stand trial and that his guilty plea was thus constitutionally void. The district court held, however, that relief on this claim was barred because Silverstein had neglected to raise the issue on his direct appeal. We reverse and direct that the writ be issued.

I.

Silverstein is, allegedly, retarded and illiterate. He has an I.Q. of 74 and, according to one of his doctors, the mental age of a seven-year-old. He has not developed intellectually beyond the second grade level. He has a long institutional history, having been committed to Rockland State Hospital three times and held for observation at least once at Bellevue and Mid-Hudson State Hospitals. He has been diagnosed as possibly schizophrenic.[1]

In 1976, Silverstein was arrested and indicted in Bronx County on several charges growing out of three "gunpoint" robberies allegedly committed with an accomplice. He was released on bail, defaulted and was arrested again on March 4, 1977.

One month later, about April 6, 1977, pursuant to court order, Silverstein was examined by two psychiatrists. Both agreed he was incompetent to stand trial. On April 12th Justice Goldfluss, of the New York Supreme Court in Bronx County, accepted the psychiatrists' report. The court stated for the record, "having examined such. . . . report, . . . it now appears to my satisfaction that the defendant as a result of the mental disease or defect lacks capacity to understand the proceedings against him or to assist in his defense." Accordingly, the court ordered Silverstein detained at Bellevue, pending transfer by the State Department of Mental Hygiene.

One week later, on April 19th, the Mid-Hudson Psychiatric Center informed the Bronx County district attorney

[1] Because no hearing into Silverstein's competence has ever been held, the facts concerning Silverstein's competence have never been established. These allegations, the precise details of which we do not rely on in reaching our decision, are, in any event, not controverted by the state on this appeal.

that a third psychiatrist had found Silverstein competent to stand trial, allegedly on the basis of one fifteen-minute interview. In proceedings on May 20th, Justice Goldfluss accepted this third psychiatric report. A few moments later, per an agreement with the Bronx County district attorney, Silverstein pled guilty to one count of robbery in the first degree, armed robbery, under N.Y. Penal Law § 160.15(2) (McKinney 1975). All remaining charges were dropped. Neither the court nor Silverstein's counsel suggested that the disagreement between the three psychiatrists be resolved at a hearing, as required by N.Y. Crim. Proc. Law § 730.30(4) (McKinney, 1971).[2] Indeed, no hearing into Silverstein's competence to stand trial or to make a plea bargain was ever held.

The sentencing proceeding on June 21, 1977, again demonstrated Justice Goldfluss' knowledge that Silverstein "has had without question a psychiatric history," including a series of institutionalizations. The court expressed its "feeling that this defendant has a mental problem but the community must be protected against a defendant who [is] . . . a dangerous person and I am [,] in sentencing this defendant [,] making a specific recommendation . . . that [he] receive[ ] psychiatric care. In my opinion it is essential because . . . someday he will be discharged [and] we must make every effort to see that he is not discharged in the same mental manner in which he goes in." The court sentenced Silverstein to nine to eighteen years in prison.

[2] Section 730.30(4) requires a hearing on competence whenever the examining psychiatrists are not of unanimous opinion. Alternatively, on the theory that the two-week period between the examinations makes the second examination stand apart as an independent inquiry into defendant's state of mind, § 730.20 requires the court to seek the opinion of *two* psychiatrists. Thus, however the situation is viewed, Silverstein's competence was not determined in accordance with Article 730.

Silverstein appealed his conviction. The psychiatric report finding him incompetent to stand trial apparently did not become part of the record.[3] Appellate counsel, who had not represented the defendant at trial, was allegedly never made aware of the conflicting psychiatric opinion concerning Silverstein's competence. In any event, appellate counsel failed to urge incompetence as a ground for vacating the conviction. Counsel failed to argue that the trial court had not complied with the procedural requirements of § 730.30 for determining competence. Counsel appealed only on the ground that the sentence was excessive in light of the defendant's diminished mental capacity and his lack of intent to harm his victims. The Appellate Division affirmed without opinion, 65 A.D.2d 679 (1978), and leave to appeal to the Court of Appeals was denied (Nov. 28, 1978).

On September 20, 1980, Silverstein, acting *pro se*, commenced the series of proceedings that culminated in this appeal. He petitioned the New York Supreme Court, Bronx County, under N.Y. Crim. Proc. Law § 440.10 (McKinney 1971) to vacate his conviction. He argued,

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[3] The record establishes only that the third psychiatric report, finding Silverstein competent to stand trial, became part of the record on Silverstein's direct appeal to the New York Appellate Division. In its "Affirmation in Opposition" to Silverstein's collateral attack in state court on his conviction, the state argued that "with regard to the allegation that he was incompetent to stand trial, the lower court at the plea proceedings contained a psychiatric report finding defendant competent. Since this report was part of the record below and since defendant's appellate counsel received a copy of it . . . defendant could have pursued this issue on direct appeal." This argument implies that the first two reports finding Silverstein incompetent did not become part of the record on appeal and were not provided to Silverstein's appellate counsel. Since our resolution of this case makes it unnecessary to undertake the "cause and prejudice" analysis of *Wainwright v. Sykes*, 433 U.S. 72, 89 (1977), we find it unnecessary to remand for a hearing to determine why appellate counsel was never apprised of all the facts.

inter alia, that he had never been aware of his right to a hearing on competence.[4] In any event, he argued, "petitioner although an adult is no more than a seven year old child incapable of understanding" his constitutional rights. Thus, "petitioner[,] an illiterate with the mentality of a seven year old[,] waved [sic] no such rights and [neither] counsel nor court had any right to wave [sic] his rights."

The state argued in response that Silverstein's petition should be dismissed under § 440.10(2)(c), which requires denial of relief where the grounds for setting aside the conviction could have been raised on direct appeal but were not. The state argued specifically that because appellate counsel had been provided with a copy of the psychiatric report finding the defendant competent, counsel could have raised on appeal the question of defendant's competence to stand trial.[5]

Justice Goldfluss, who had first found defendant incompetent, then competent, and then accepted the guilty plea, also heard the § 440.10 motion to set aside the conviction. The court's one-sentence opinion dismissing the petition tacitly rejected the state's procedural default argument, resting the dismissal instead on the factually erroneous ground that "[t]he issues presented by the defendant have already been determined by the Appellate Division."

On December 29, 1980, Silverstein, again acting *pro se*, filed his second § 440.10 petition. Silverstein reiterated his claims that he had been incompetent to stand trial and

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4 Silverstein also argued (1) that the trial court had accepted his plea without determining whether he had committed all the elements of the crime and whether he understood all the rights he was waiving and (2) that he had received ineffective assistance of trial counsel.

5 *See supra* note 3.

that he had been denied his right to a proper determination of his competence under N.Y. Crim. Proc. Law art. 730 (McKinney 1971). Silverstein also complained that counsel had failed to follow his suggestions to contest on appeal his competence to stand trial.[6]

The state filed no opposing papers. Justice Goldfluss dismissed the petition on the ground that it contained "nothing new or novel that hasn't been brought to the attention of either this court or the Appellate Division." The court made explicit its earlier implicit holding that the defendant's mental capacity had been "clearly brought to the attention of the Appellate Division."

On January 8, 1981, Silverstein filed a *pro se* petition for a writ of habeas corpus in the District Court for the Southern District of New York. He subsequently retained counsel, who filed supporting papers. Silverstein claimed five grounds for relief: First, that the denial of a competency hearing and the acceptance of his guilty plea when he was incompetent to stand trial deprived him of due process; second, that the court improperly accepted his plea without determining whether he had committed all the elements of the crime; third, that he had been deprived of effective assistance of counsel on appeal and at trial; fourth, that by pleading guilty he had unknowingly waived his constitutional rights to confrontation, trial by jury, etc.; and fifth, that his sentence had been based upon misrepresentations in his presentence report.[7] The district court refused to consider the fifth claim, which

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6 In addition to the grounds alleged in the earlier petition, Silverstein also argued that he had been deprived of effective assistance of counsel on appeal and that his trial counsel had not informed him that he could testify before the grand jury in hopes of obtaining a "no bill."

7 Our resolution of the competence claim makes discussion of the remaining claims unnecessary.

had not been raised as a constitutional claim in state proceedings. The court found that the remaining four claims had been exhausted, and this finding is not disputed on appeal.

The state argued that *Wainwright v. Sykes*, 433 U.S. 72 (1977), bars the federal court from reaching the merits of these claims, because the state court had denied relief on an independent and adequate state procedural ground—Silverstein's failure to raise the issues on direct appeal. In addressing this argument, the district court noted that Justice Goldfluss' express reason for denying relief—that the issues had already been determined on direct appeal—was erroneous. To determine the state court's "precise *ratio decidendi*" for denying relief, the district court looked to the papers filed by the state in the first § 440.10 proceeding. As noted above, the state had argued that Silverstein was guilty of procedural default under N.Y. Crim. Proc. Law § 440.10(2)(c) in failing to raise the issues on direct appeal. On this basis, the district court concluded that the state court must have been "thinking along procedural lines," and that this procedural ruling barred federal consideration of Silverstein's claims.[8]

II.

Here too the state urges that we may not reach the merits, because this once *pro se* petitioner has not successfully wound his way through the labyrinthine procedural requirements surrounding federal habeas relief. We disagree.

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[8] Although the court held that the ineffective assistance of counsel claim based on failure to seek suppression of an involuntary confession was not barred by procedural default, it concluded that this claim was without merit.

The state argues, somewhat mysteriously, that the district court "blatantly ignored the Supreme Court's interdict" by "outright refus[ing] to adhere to the doctrine of *Rose [v. Lundy]*," 102 S. Ct. 1198 (1982), a case decided three months *after* the district court filed its decision. *Rose v. Lundy* requires the district courts to dismiss any habeas petition containing both exhausted and unexhausted claims; after such a dismissal, the petitioner would be free to strike from his papers all references to the unexhausted claims and to resubmit the petition to the federal court. However, following this Circuit's pre-*Rose* procedure, the district court simply refused to consider in any way the unexhausted claim, while going on to pass on the remaining grounds for relief.

We are confident that had *Rose* been the law, the district court would have required either the refiling of an amended petition or the substantial equivalent. However, because the state "failed" to raise the *Rose* issue before the district court,[9] the district court did not follow the precise dismissal litany. And thus the state now urges that we vacate the opinion below and remand the case so that the district court can formally dismiss the petition, Silverstein can then amend and refile his petition, the district court may then reconsider the amended petition and come to the same decision and send the case back to us.

We see no merit in this proposal. We hold that the *Rose* requirements were satisfied when the petitioner stated in

[9] We, of course, place no weight on the state's failure to raise the issue of the total exhaustion requirement in the district court. For the state executive branch may not ordinarily have the power to waive the deference due state courts. Nevertheless, we note that exhaustion is not jurisdictional; rather, it reflects more flexible principles of comity. *Darr v. Burford*, 339 U.S. 200, 203-11 (1950); *United States ex rel. Johnson v. Vincent*, 507 F.2d 1309, 1312 (2d Cir. 1974), *cert. denied*, 420 U.S. 994 (1975); *accord, Ballard v. Maggio*, 544 F.2d 1247, 1249 (5th Cir. 1977); *United States ex rel. Graham v. Mancusi*, 457 F.2d 463, 468 (2d Cir. 1982).

his brief, in oral argument, and in a letter to this court that he was withdrawing his unexhausted claim and all references to the elements of that claim in his briefs and in his habeas petition. *See Rock v. Coombe*, 694 F.2d 908 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3567 (U.S. Jan. 28, 1983); *Guthrie v. Warden*, 683 F.2d 820, 821 n.1 (4th Cir. 1982).

In *Rock v. Coombe, supra*, this court rejected a suggestion similar to the state's proposal where the district court, in a decision rendered after the Supreme Court decided *Rose*, had "ignored the dictates of *Rose v. Lundy* and dealt with the exhausted claims on the merits," *id.* at 914. In this situation, we permitted the petitioner to comply with *Rose* by withdrawing and abandoning his unexhausted claims at the appellate level. We saw "no reason to require the court to go through the jejune exercise of dismissing the petition and requiring that a new piece of paper be filed." *Id.* Any other result would have construed the petitioner's right to narrow his petition in order to submit only his exhausted claim "as a right encased in rigid formality." *Id.*

We believe that this appeal from a decision issued prior to *Rose* presents, if anything, an even stronger case for applying the total exhaustion rule by requiring the petitioner to withdraw his unexhausted claims at the appellate level.[10] Since Silverstein's exhausted and unexhausted

[10] We note that the Court of Appeals are apparently divided on the question of *Rose's* retroactive application. *Compare Bowen v. Tennessee*, 698 F.2d 241 (6th Cir. 1983) (en banc) (applying *Rose v. Lundy* retroactively and remanding to the district court with instructions to dismiss), *and Jones v. Hess*, 681 F.2d 688, 695 (10th Cir. 1982) (applying *Rose v. Lundy* retroactively to require dismissal where the unexhausted claims were "arguably intertwined" with the exhausted claims), *with Guthrie v. Warden*, 683 F.2d 820, 821 n.1 (4th Cir. 1982) (declining to give *Rose v. Lundy* rigid retroactive application where petitioner had abandoned his unexhausted claims early in the case and where petitioner would simply refile amended complaint if dismissed).

(footnote continued)

claims are plainly in no way intertwined, *see Rose, supra* at 1204, a more formal retroactive application of *Rose* would neither serve the purposes underlying the total exhaustion rule nor so "encourage state prisoners to seek full relief first from the state courts," *id.* at 1203, as to justify an otherwise pointless and burdensome exercise in paper shuffling.

III.

The State next argues that Silverstein's failure to challenge his competence on his direct appeal constitutes a waiver of his constitutional rights under N.Y. Crim. Proc. Law § 440.10(2)(c). The state court allegedly denied collateral relief after finding waiver under the statute, and, the argument goes, this finding constitutes an independent and adequate state ground immune from attack in a federal court. *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Forman v. Smith*, 633 F.2d 634 (2d Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981). We cannot agree. First, the New York courts could not constitutionally apply a procedural default rule to a possibly incompetent defendant. Second, the state's argument rests on an erroneous interpretation of New York criminal procedure. Finally, no New York court found Silverstein guilty of procedural default.

The Supreme Court's application of *Rose* to, and summary treatment of, three habeas cases pending on petition for certiorari when *Rose* was decided, *Bergman v. Burton*, 102 S. Ct. 2026 (1982); *Rodriquez v. Harris*, 102 S. Ct. 1627 (1982); *Duckworth v. Cowell*, 102 S. Ct. 1626 (1982), while not entirely illuminating, do not appear to indicate that a petitioner cannot effectively withdraw an unexhausted claim in order to avoid dismissal of the petition.

A.

In *Pate v. Robinson*, 383 U.S. 375 (1966), the Supreme Court expressly denied that a habeas petitioner could have waived his right to a competency hearing by failing to request one at trial. *Id.* at 384. For "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." *Id.*; *see Suggs v. LaVallee*, 570 F.2d 1092, 1116-17 (2d Cir.), *cert. denied*, 439 U.S. 915 (1978); *United States ex rel. Roth v. Zelker*, 455 F.2d 1105, 1108 (2d Cir.), *cert. denied*, 408 U.S. 927 (1972). Since the trial court in *Pate* had been alerted to the doubts as to the defendant's sanity, the Supreme Court rejected the claim that "no duty rested upon [the trial court] to order a hearing *sua sponte*." 383 U.S. at 378. Indeed, the trial court's failure to inquire into defendant's competence on its own motion "deprived [the petitioner] of his constitutional right to a fair trial." *Id.* at 385.

The question presented here is whether the waiver rule of *Wainwright v. Sykes*, *supra*, and *Forman v. Smith*, *supra*, applies to the right recognized by *Pate v. Robinson*. We conclude that it does not. *Wainwright* was premised on the defendant's violation of a constitutionally sound state procedural rule placing solely on the defendant the burden of contemporaneously objecting to the introduction of evidence. In contrast to *Pate*, *Wainwright* expressly rejected an argument that the Constitution both barred the state from applying such a rule and required the state to place the burden of objecting to the introduction of an involuntary confession on the trial court. *Wainwright*, *supra*, at 85-87. The Court held that under the Constitution the defendant merely had the right "at some stage in the proceedings *to object* to the use of

the confession and to have a fair hearing and a reliable determination on the issue of voluntariness." *Wainwright, supra,* at 86 (emphasis in original) (quoting *Jackson v. Denno, supra,* at 376-77.) As to such a right, the state was entitled to treat the failure to object as a waiver.

However, *Wainwright*'s waiver rule cannot apply when the basis for attacking the conviction is that the defendant is incompetent to stand trial, and thus incompetent to "waive" his rights. *Zapata v. Estelle,* 588 F.2d 1017, 1021 (5th Cir. 1979). Thus, when the trial court neglects its duty to conduct a hearing on competence, the defendant's failure to object or to take an appeal on the issue will not bar collateral attack. *Hayes v. United States,* 468 F. Supp. 179, 184 (S.D. Tex. 1979).

B.

We do not believe that the New York courts would reach a contrary result. For New York law provides the procedural protection *Pate* requires. The New York Court of Appeals has held that when the demeanor of the defendant or other evidence raises doubt as to his competence to stand trial, it is the trial court's duty to order a hearing *sua sponte. People v. Gonzalez,* 20 N.Y.2d 289, 293 (1967), *reaffirmed in People v. Armlin,* 37 N.Y.2d 167, 171 (1975); *see People v. Smyth,* 3 N.Y.2d 184, 187 (1957). And New York Criminal Procedure Law § 730.30(4) specifically requires the court to order a hearing on its own motion when, as here, the examining psychiatrists disagree on the defendant's competence. *See also People v. Bradt,* 77 A.D.2d 795 (1980) (error not to order hearing where reports finding defendant competent were conclusory and where evidence suggested incompetence); *People v. Candella,* 49 A.D.2d 800, 801 (1975) (same).

Thus, we are convinced that the New York courts would reject the argument that, by failing to raise the issue on direct appeal, Silverstein forfeited or waived his right to contest his competence to stand trial.[11] Indeed, citing *Pate v. Robinson*, the New York Court of Appeals has held that neither the failure to object at trial to inadequacies in the determination of competency nor the failure even to raise the issue at trial will bar the defendant from raising the issue for the first time on appeal. *People v. Armlin, supra*, at 170-72; *People v. Bangert*, 22 N.Y.2d 799, 800 (1968). Thus, if the trial court has been alerted to the defendant's mental problems and fails to order a hearing on competence, the conviction will be set aside on collateral review, even though the defendant failed to challenge his competence at trial, failed to request a competency hearing, and failed to appeal the issue. *People v. Freyre*, 76 Misc. 2d 210 (Sup. Ct. 1973).

C.

Finally, we believe that the state court denied collateral relief on the mistaken ground that the question of compe-

[11] Thus, even if our interpretation of Justice Goldfluss's ruling, *infra*, were incorrect and he had denied relief on the basis of a finding of procedural default, this finding would not be dispositive in a federal habeas proceeding. As noted above, *Wainwright* invoked the "well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts." *Id.* at 81 (citations omitted). However, this immunity is not absolute, in either the substantive or the procedural context. For it is equally well established that a state may not, in an attempt to deprive a litigant of the right to a hearing on a federal claim, manipulate its findings of law, *see Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 379 (1813), (overruling Virginia Supreme Court finding of law that an inquest of office was not necessary to vest land in the Commonwealth), or fact, *see Summer v. Mata*, 449 U.S. 539, 548 (1981); *Maxwell v. Summer*, 673 F.2d 1031, 1035-36 (9th Cir.), *cert. denied*, 51 U.S.L.W. 3340 (U.S. Nov. 1, 1982). Thus, an unsupported or manipulative finding of procedural default would not constitute an adequate state ground barring federal habeas relief.

tence had already been fully litigated, rather than the ground that Silverstein had not appealed on the basis of his incompetence.[12] The state court's terse opinion in the first § 440 proceeding simply notes that all of the issues raised in Silverstein's petition "have already been determined by the Appellate Division." In ruling on the second § 440 proceeding, the state court was more explicit: As to the claim that the petitioner "was mentally incompetent at all times," Justice Goldfluss noted that the "underlying rationale in [Silverstein's direct appeal,] which was clearly brought to the attention of the Appellate Division, is that the defendant is retarded." Thus, "[t]here is nothing new or novel [in the petition] that hasn't been brought to the attention of . . . the Appellate Division. Consequently, the application and the motion made *pro se* is denied."

These remarks indicate that the state court denied Silverstein's motion to vacate his conviction under N.Y. Crim. Proc. Law § 440.10(2)(a) (McKinney 1971), which requires the court to deny relief when "[t]he ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment." Erroneous or not, this ruling does not constitute a finding of procedural default that would bar federal consideration of Silverstein's claims. *Maxwell v. Sumner*, 673 F.2d 1031, 1034 (9th Cir.) (*Wainwright v. Sykes* inapplicable when state denies habeas relief on ground that petitioner's arguments had been rejected on appeal), *cert. denied*, 103 S. Ct. 313 (1982).

In sum, under *Wainwright*, Silverstein's failure to allege on direct appeal that he was incompetent does not

[12] Because the evidence as to the state court's holding is entirely documentary, we are as competent to pass on this factual question as the district court. *Taylor v. Lombard*, 606 F.2d 371, 372 (2d Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); *Jack Kahn Music v. Baldwin*, 604 F.2d 755, 758 (2d Cir. 1979).

bar federal habeas relief.[13] The New York courts did not, would not, and constitutionally could not find that Silverstein had waived his right to challenge his conviction on the ground that he was incompetent to stand trial.

IV.

We now turn to the merits of the petitioner's claim. We have held that the trial court must order a hearing when there is "reasonable ground" for believing that the defendant may be incompetent to stand trial. *United States ex rel. Roth v. Zelker*, 455 F.2d 1105, 1108 (2d Cir.), *cert. denied*, 408 U.S. 927 (1972).[14] Recognizing that there are "no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed," *Drope v. Missouri*, 420 U.S. 162, 180 (1975), we hold that in light of the undisputed facts, there were sufficient indicia of incompetence before the trial court to require a hearing. The state trial court had before it the reports of three psychiatrists. The mere fact that the last

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[13] Even if *Wainwright v. Sykes* were applicable, we believe that petitioner would be entitled to a hearing as to the "cause" for his failure to raise the issue of competence on direct appeal. *See supra* note 3.

We also believe that the defendant could show adequate "prejudice" under *Wainwright*. The acceptance of petitioner's plea in the absence of a hearing to establish competence establishes prejudice in that it so infected the process "that the resulting conviction violates due process." *United States v. Frady*, 102 S. Ct. 1584, 1595 (1982) (quoting *Henderson v. Kibbe*, 431 U.S. 145, 146-47 (1973)). We believe that this "fundamental miscarriage of justice" meets the prejudice standard of *Wainwright v. Sykes*. *See United States v. Frady*, *supra*, at 1596; *Engle v. Isaacs*, 102 S. Ct. 1558, 1575 (1982).

[14] *See also Acosta v. Turner*, 666 F.2d 949, 954 (5th Cir. 1982) (requiring a hearing when there is a "bona fide doubt" as to competency); *United States v. Hayes*, 589 F.2d 811, 823 (5th Cir.) ("substantial" doubt), *cert. denied*, 444 U.S. 847 (1979).

of these reports found the petitioner competent to stand trial did not suffice to settle the question, given that two psychiatrists had submitted contrary reports just a few days before.[15] The doctors' disagreement gave the trial court reasonable grounds for doubting that Silverstein was competent to stand trial. Moreover, this doubt could only have been reinforced by the presentence report noting Silverstein's long institutional history and earlier diagnoses finding him retarded and possibly schizophrenic. *Saddler v. United States*, 531 F.2d 83, 86-87 (2d Cir. 1976). In these circumstances, the trial court's failure to order a hearing, *sua sponte* if necessary, violated the defendant's right to a fair trial. *Pate v. Robinson, supra*, at 385.

If the defendant were in fact incompetent at the time of trial, the acceptance of his plea would be void as a violation of due process. *Suggs v. Lavallee*, 570 F.2d 1092, 1116 (2d Cir.), *cert. denied*, 439 U.S. 915 (1978). However, we doubt that a meaningful hearing on the question of the defendant's competence to stand trial at the time of his plea almost six years ago, on May 20, 1977 could be held at this late date. *See Drope v. Missouri, supra*, at 183 (adequate hearing not possible five years after conviction); *Pate v. Robinson, supra*, at 387 (likewise for six years after conviction). A retrospective determination of Silverstein's competence to stand trial would have to be based on three conflicting written reports, a

[15] The Ninth Circuit reached a different conclusion in a case where the third psychiatric report finding the defendant competent to stand trial was based on interviews conducted five months after two psychiatrists had found the defendant incompetent. *United States v. Caplan*, 633 F.2d 534, 539-42 (9th Cir. 1980). The defendant's status had apparently improved under interim psychiatric treatment. Because there was no other specific evidence of the defendant's alleged incompetence, the court of appeals held that it had not been an abuse of discretion not to conduct a competency hearing upon receipt of the third report.

cold, sparse record, and the recollection of those who saw and dealt with him six years ago. Such a hearing would be a wholly inadequate substitute for the "concurrent hearing" into competency mandated by *Pate*. *Pate, supra,* at 387; *see Drope v. Missouri, supra; Dusky v. United States,* 362 U.S. 402, 403 (1960).[18] Accordingly, we reverse and direct the issuance of the writ of habeas corpus unless the state brings Silverstein to trial within a reasonable time.[19]

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18 *Cf. McCarthy v. United States,* 394 U.S. 459, 470 (1969) (because of doubts about the voluntariness of defendant's guilty plea, the court set aside the conviction rather than order a hearing into voluntariness, holding that "[t]here is no adequate substitute for demonstrating *in the record at the time the plea is entered* the defendant's understanding of the nature of the charge against him." (emphasis in original)).

19 We have not been in any way concerned with whether Silverstein may have been legally responsible for the crimes with which he has been charged. Consequently, nothing we have said is to be construed as an expression of opinion on that issue.

SUPREME COURT OF THE STATE OF NEW YORK

TRIAL TERM PART 14 : BRONX COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

-against-

NORMAN SILVERSTEIN,

Defendant.

INDICTMENT NO 994/76

April 12, 1977

B E F O R E: HON. HOWARD GOLDFLUSS,
Justice

A P P E A R A N C E S:

MARIO MEROLA, ESQ.
District Attorney, Bronx County
BY: JOEL LUTWIN, ESQ.
Assistant District Attorney

OTTO FUSCO, ESQ.
Attorney for Defendant
BY: ARTHUR F. X. HENRIKSEN, ESQ.

ALLAN R. SHERMAN
Court Reporter

hsr

Appendix B

THE CLERK: Number 7 and 20. Norman Silverstein.

MR. HENRIKSEN: Otto Fusco by Arthur F. Henriksen for Norman Silverstein.

MR. LUTWIN: Number 7 has been presented to the Grand Jury on April 11, your Honor. I don't know what the status is now, so, could we have --

MR. HENRIKSEN: I'm not sure whether that defendant wuld not want to appear before the Grand Jury.

THE COURT: For the record, the report back from --

MR. HENRIKSEN: Your Honor, could we wait?

(Whereupon there was a brief pause.)

MR. HENRIKSEN: If your Honor pleases, on the 22nd of March, on your order, a psychiatric examination was conducted by Dillont and Angeles, a report has been rendered dated April 7th and April 6th respectively, where both concluded, medically and psychiatrically that the defendant is incompetent and unfit to proceed. I accordingly move to confirm their respective reports.

MR. LUTWIN: Number 3 is a N.C.B. case. They

should have an opportunity, I doubt very strongly whether they could oppose the findings of the psychiatrist. Neither will I at this time.

THE COURT: For the record, this report has been received by the Court pursuant to 730 of the C.P.L., Article 730, and the finding by two psychiatrists is that the defendant, that his judgment and intelligence are sufficiently impaired to the extent that he cannot assist in his own defense and he is unfit to proceed. Under those circumstances, the motion to confirm the report is granted and the defendant, Norman Silverstein, having been examined pursuant to Court Order by two psychiatric examiners, the Court having examined such examination report, a copy of which will be attached to this order, it now appears to my satisfaction that the defendant as a result of the mental disease or defect lacks capacity to understand the proceedings against him or to assist in his defense.

I therefore order that the defendant is to be continued in detention and referred to--he will be in Beelevue Hospital until such time as Department of Mental Hygiene sends him to the appropriate institution. All right. So ordered.

THE CLERK: What about the other indictment, Judge?

THE COURT: Well, at this point, since there is no indictment --

THE CLERK: There is no indictment.

THE COURT: The District Attorney is advised of the determination by the psychiatrist and whether the District Attorney wishes to proceed and get an indictment is up to them. At this point, however, we'll mark the case off.

We'll give it a control date of April 22nd for the other case.

This is to certify that the foregoing is a true and accurate transcription of the original stenographic record of Allan R. Sherman, Court Reporter, to the best of my ability.

HERBERT S. REING, C.S.R.
Principal Court Reporter

MOTION FILED
AUG 26 1983

ORIGINAL

No. 82-2156

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM,

ROBERT HENDERSON,

Petitioner,

-v.-

NORMAN SILVERSTEIN,

Respondent.

SUPREME COURT, U.S.
SUPREME COURT, U.S.
SUPREME COURT, U.S.

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APPLICATION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

Respondent Norman Silverstein respectfully seeks leave to proceed here in forma pauperis, without payment of filing fees and costs.

Counsel certifies that, in proceedings before the lower court in this case, petitioner was represented by counsel assigned pursuant to the Criminal Justice Act.

New York, New York

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New York, New York, 10004
Tel.: 212-509-5474

Attorney for Respondent

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